THE SUPREME COURT OF WASHINGTON

SUPREME COURT NO. 96655-9
COURT OF APPEALS NO. 76576-1-I

GREAT OCEAN CAPITAL HOLDING, LLC, a Washington limited liability company; HUY YING CHEN and XUE PING WANG, Husband and Wife Residing in Washington State;

Petitioners.

v.

YANLU LIU and AI HUA PAN, Husband and Wife Residing in King County, Washington; PENG ZHANG and ZHONGYUAN PAN, Husband and Wife Residing in Ontario, Canada,

Respondents,

Respondents' Response in Opposition to Petitioner Great Ocean Capital Holding, LLC's Petition for Review

---

James P. Ware, WSBA No. 36799
Courtney D. Bhatt, WSBA No. 46298
jware@mdklaw.com
cbhatt@mdklaw.com

MDK Law
777 108th Ave. NE, Suite 2000
Bellevue, WA 98004
(425) 455-9610
Attorneys for Respondents

RESPONSE TO GOCH'S PETITION FOR REVIEW

TABLE OF CONTENTS

Page

I. INTRODUCTION 1, 2

II. RESPONSE TO GOCH'S PETITION FOR REVIEW 2, 3

(1). GOCH presents no evidence in the record to support the allegation that the United States Citizenship and Immigration Service ("USCIS") granted Respondents Pan and Zhang a conditional Green Card. Nonetheless, such evidence would have no bearing on the outcome of this matter, and would not deprive the King County Superior Court of subject matter jurisdiction over Pan's Washington State Securities Act Claim. Accordingly, the King County Superior Court had subject matter jurisdiction over Pan's WSSA claims.

III. LEGAL ANALYSIS.....3

A. Considerations Governing Acceptance of Review 3, 4, 5

B. Respondent Pan's WSSA Claim Is Not Preempted By Federal Law, And The Trial Court Has Subject Matter Jurisdiction Over This Matter.....5

(i). De Novo Review of Jurisdicition.....5
(ii). The Trial Has Subject Matter Jurisdiction Over This Matter.....6-9

C. GOCH Lacks Evidence In The Record To Support Its Assertion That Pan Has Not Complied With Federal Law; and GOCH's Argument That Pan Has Not Abided By A Valid Enforceable Operating Agreement Should Be Disregarded Because The Argument Is Conclusory And Not Supported By Any Evidence.....9

(i). GOCH Lacks Evidence In The Record to Support Its Assertion That Pan Has Not Complied With Federal Law.....9, 10
(ii). GOCH's Argument That Pan Has Not Abided By A Valid And Enforceable Operating Agreement Should Be Disregarded Because They Are Conclusory And Not Supported By Any Evidence..... 10-16

IV. CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

Aspelund v. Olerich, 56 Wn. App. 477, 481-82, 784 P.2d 179 (1990)……13

Burnside v. Simpson Paper Co., 66 Wn. App. 510, 517, 832 P.2d 537 (1992)……6

Federal Home Loan Bank v. Barclays Capital, Inc., 1 Wn. App. 2d 551, 565, 406 P.3d 686 (2017)……14

FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 175 Wn. App. 840, 868, 309 P.2d 555 (2013)……14

Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 114, 86 P.3d 1175 (2004)……12, 13

Havens v. C&D Plastics, Inc.,124 Wn.2d 158, 182, 876 P.2d 435 (1994))……13

Helenius v. Chelius, 131 Wn. App. 421, 432, 120 P.3d 954 (2005).……11

In re Major, 71 Wn. App. 531, 859 P.2d 1262 (1993)……8

In re Pers. Restraint of LaLande, 30 Wn.App. 402, 405, 634 P.2d 895 (1981)……4

Orwick v. Seattle, 103 Wn.2d 249, 251, 692 P.2d 793 (1984)……9

Right-Price Recreation LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 380 46 P.3d 789 (2002)……4

State ex. Rel. Martin v. Superior Court, 101 Wash. 81, 94, 172 P.257, 4 A.L.R. 572 (1918).……6, 9

State v. L.J.M., 129 Wn.2d 395, 918 P.2d 898 (1996)……5

State v. Squally, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997)……5

State v. State Credit Asso, 33 Wn. App. 617, 657 P.2d 327 (1983) ……4

Stewart v. Estate of Steiner, 122 Wn. App. 274, 93 P.3d 919 (2004) ……14

ZDI Gaming, Inc. v. Wash. State Gambling Comm'n, 173 Wn.2d 608, 268 P.3d 929 (2012)……6

Rules

RCW 21.20 et. seq. 2

RCW § 21.20.430 12

RCW § 21.20.430(2) 11

RCW § 21.20.430(4)(b) 11

Statutes

15 U.S.C. § 77r(c)(1)(A)(i) 5

APPENDIX

Appendix A –Court of Appeals Division 1 October 15, 2018 ruling 1

(I). INTRODUCTION.

As it has done countless times before, Petitioner Great Ocean Capital Holding, LLC ("GOCH") has filed a petition that rehashes the same argument made in multiple pleadings before the Court of Appeals and the trial court. Specifically, GOCH alleges that when the United States Citizenship and Immigration Service ("USCIS") granted Respondents Bonnie Pan ("Pan") and Peng Zhang ("Zhang") a conditional green card, the state court was deprived of subject matter jurisdiction. GOCH presents no evidence in the record that supports the allegation that Respondents received a conditional green card. Furthermore, the Court of Appeals specifically rejected the argument and noted that "the absence of this evidence has no impact on the outcome of the merits of Great Ocean's appeal."[1] Simply put, there is no proof that Pan and Zhang violated federal law.

In rejecting GOCH's position, the Court of Appeals noted that the federal law that governs EB-5 investments and the creation of "regional centers" contains no provision that preempts a state law securities claim. Secondly, the Court noted that federal securities laws specifically allow for claims under WSSA. In this Petition, GOCH has presented no new

[1] See Division 1's October 15, 2018 ruling at p. 14, attached hereto as "Appendix A."

factual allegation or legal authority that could question the soundness of the Court of Appeal's decision.

Notwithstanding these facts, it must be noted that Washington courts have subject matter jurisdiction over Pan's claims because the principal claim in this matter—and the claim for which Pan received a judgment of rescission, interest, and attorney fees—is violation of the Washington State Securities Act ("WSSA"). There is no federal preemption. Washington securities laws are designed to protect investors such as Pan. See RCW 21.20 et. seq. Additionally, Washington courts have heard WSSA claims that derive out of EB-5 investments.

Because GOCH's arguments are not grounded in law or in fact, it's petition must be denied in its entirety.

(A). Identity Of Respondents.

Respondents, (collectively as the "Respondents" or Plaintiffs") are Yanlu Liu and Ai Hua Pan, Zhongyuan Pan and Peng Zhang.

(II). RESPONSE TO PETITIONER GOCH'S PETITION FOR REVIEW.

(1). GOCH presents no evidence in the record to support the allegation that the United States Citizenship and Immigration Service ("USCIS") granted Respondents Pan and Zhang a conditional Green Card. Nonetheless, such evidence would have no bearing on the outcome of this matter, and would not deprive the King County Superior Court of subject matter jurisdiction over

> Pan's Washington State Securities Act Claim. Accordingly, the King County Superior Court had subject matter jurisdiction over Pan's WSSA claims.

(III). LEGAL ANALYSIS

(A). Considerations Governing Acceptance Of Review.

Under Rule 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

None of the considerations noted above apply in this case. Accordingly, discretionary review by this Court must be denied. GOCH appears to argue that because there is a lack of subject matter jurisdiction—which is demonstrably false—the court must review Division 1's October 15, 2018 decision affirming the trial's court's order granting of summary judgment and the denial of GOCH's Motion for Reconsideration.[2] For the reasons set forth below, subject matter exists over this Washington State Securities Act matter. This is not an immigration case and GOCH cannot establish lack of subject matter

[2] See Petitioner GOCH's Petition for Review at p. 1 and 2.

jurisdiction simply because of GOCH's former status as a United States Citizen and Immigration Service designated regional center or the nature of the EB-5 program. Indeed, by its own admission, GOCH lost its regional center status, to the extent this Court believes that GOCH's status as a regional center is germane to GOCH's Petition.[3]

Discretionary review is an extraordinary procedure that should be granted in only extraordinary cases. See Right-Price Recreation LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 380 46 P.3d 789 (2002); See also State v. State Credit Asso, 33 Wn. App. 617, 657 P.2d 327 (1983).

While Washington courts appreciate the need for appellate review, they are also "mindful of the need for judicial finality and the potential for abuse of this revered system by those who would flood the courts with repetitive, frivolous claims which already have been adjudicated at least once." In re Pers. Restraint of LaLande, 30 Wn.App. 402, 405, 634 P.2d 895 (1981).

Because GOCH failed to show that Division I erred when it affirmed the trial court's granting summary judgment in Pan's favor and

[3] See GOCH's Petition for Review at p. 1.

denied GOCH's Motion for Reconsideration[4], discretionary review should be denied.

(B). Respondent Pan's WSSA Claim Is Not Preempted By Federal Law, And The Trial Court Has Subject Matter Jurisdiction Over This Matter.

(i). De Novo Review Of Jurisdiction.

Jurisdiction is a question of law reviewed de novo. State v. Squally, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997). The burden of contesting jurisdiction requires that the defendant point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction. State v. L.J.M., 129 Wn.2d 395, 918 P.2d 898 (1996). Accordingly, GOCH has the burden of contesting jurisdiction. As explained below, GOCH has not and cannot meet this burden.

GOCH fails to establish preemption. The federal statutes and case law cited by GOCH do not expressly or impliedly address a Washington State superior court's authority to hear a WSSA claim.[5] Further, under 15 U.S.C. § 77r(c)(1)(A)(i), states retain the authority "under the laws of such [s]tate to investigate and bring enforcement actions, in connection with securities or securities transactions… with respect to—fraud or

[4] See GOCH's Petition for Review at Appendix 2.
[5] See GOCH's Petition for Review at p. 14-18.

deceit." As a result, the Court of Appeals did not err when it found that Pan's WSSA claim was not preempted by federal law.

(ii). The Trial Court Has Subject Matter Jurisdiction Over This Matter.

Subject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case. See ZDI Gaming, Inc. v. Wash. State Gambling Comm'n, 173 Wn.2d 608, 268 P.3d 929 (2012)("[i]f the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction."" (internal marks omitted)(quoting Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 190 (1994)). Subject matter jurisdiction is a broad concept, one that can only be attacked when the court has no power to entertain the controversy, as when the constitution or legislature explicitly denies jurisdiction. In re Major, 71 Wn. App. 531, 859, P.2d 1262 (1993). As courts of general jurisdiction, superior courts have long had the "power to hear and determine all matters, legal and equitable, except in so far these powers have been expressly denied." State ex. Rel. Martin v. Superior Court, 101 Wash. 81, 94, 172 P.257, 4 A.L.R. 572 (1918). Courts may only find a lack of jurisdiction under compelling circumstances, such as when it is explicitly limited by Congress. As the court stated in Burnside v. Simpson

Paper Co., 66 Wn. App. 510, 517, 832 P.2d 537 (1992), review granted, 120 Wn.2d 1019 (1993):

> Because the Washington State Constitution confers such a broad grant of jurisdiction on the superior courts, exceptions to that jurisdictional grant will be narrowly read. Orwick v. Seattle, 103 Wn.2d 249, 251, 692 P.2d 793 (1984). If a Legislature has shown no indication of its intention to limit jurisdiction, an act should be construed as imposing no limitation. 21 C.J.S. Courts § 13.

In this matter, federal law does not preempt Pan's WSSA claim. GOCH's marketing materials alleged that the project would create several thousand jobs in the local market and was "shovel ready"[6] when it was not. Central to the commencement of the project was a purported 80-year lease that Great Ocean had secured with the Port of Longview.[7] Chen has already admitted that, in fact, neither GOCH or any entity or person affiliated with Great Ocean ever secured a lease with the Port of Longview.[8] Instead, the company had been in negotiations with the Port of Longview to secure a lease and had what Chen described as a pre-lease agreement with the Port of Longview.[9] The core of Respondents' claims are based upon these material misrepresentations, not the site's regional center status.

---

[6] CP 52
[7] CP 40-41, 57-58.
[8] CP 435.
[9] CP 459.

Here, GOCH did not present compelling case law or argument to support discretionary review of Division I's determination that the trial court had subject matter jurisdiction over this matter. At an attempt at the "second bite of the apple", GOCH now quotes various case law about the Court's power to hear subject matter jurisdiction, state that upon Pan's I-52 approval, that the $500,000.00 capital contribution belonged to the federally approved project under the EB-5 Program, and that by allowing the trial Court "to return these funds back to an approved EB-5 applicant that the state trial court interfered with U.S. federal regulations and the Washington State's and the United States Contract's Clause."[10] GOCH presents no cognizant argument why it believed that the trial court could not render judgment based upon RCW § 21.20 et seq. Accordingly, this Court should deny GOCH's Petition for Review.

Subject matter jurisdiction is a broad concept, one that can only be attacked when the court has no power to entertain the controversy, as when the constitution or legislature explicitly denies jurisdiction. In re Major, 71 Wn. App. 531, 859 P.2d 1262 (1993). As courts of general jurisdiction, superior courts have long had the "power to hear and determine all matters, legal and equitable…except in so far as these

[10]See GOCH's Petition at p. 4 and 5.

powers have been expressly denied." State ex. Rel. Martin v. Superior Court, 101 Wash. 81, 94, 172 P. 257, 4 A.L.R. 572 (1918).

Courts may only find a lack of jurisdiction under compelling circumstances, such as when it is explicitly limited by the legislature or Congress. As the court in Burnside v. Simpson Paper Co., 66 Wn. App. 510, 517, 832 P.2d 537 (1992), *review granted*, 120 Wn.2d 1019 (1993) stated, "because the Washington State Constitution confers such a broad grant of jurisdiction on the superior courts, exceptions to that jurisdictional grant will be narrowly read. Orwick v. Seattle, 103 Wn.2d 249, 251, 692 P.2d 793 (1984).

Congress has not expressly limited the jurisdiction of Washington state courts over Washington State Securities Act matters. Furthermore, GOCH presents no compelling reason as to why this court lacks jurisdiction over this matter. Accordingly, GOCH's Petition for Discretionary Review must be denied in its entirety.

(C). GOCH Lacks Evidence In The Record To Support Its Assertion That Pan Has Not Complied With Federal Law; and GOCH's Argument That Pan Has Not Abided By A Valid And Enforceable Operating Agreement Should Be Disregarded Because The Argument Is Conclusory And Not Supported By Any Evidence.

(i). GOCH Lacks Evidence In The Record to Support Its Assertion That Pan Has Not Complied With Federal Law.

Preliminarily, this is not an immigration case. Pan did not assert any federal law claims and she did not obtain her judgment based upon a federal statute. GOCH makes the conclusory argument that a state trial court does not have jurisdiction over matters touching on immigration. But this is not an immigration case, and GOCH cannot establish a lack of subject matter jurisdiction simply because of GOCH's former status as a United States Citizen and Immigration Service designated regional center or the nature of the EB-5 program.

Second, GOCH cannot point to any facts in the record to support its allegation that the court must invoke judicial restraint because Pan has not complied with federal law. Even assuming GOCH presented such evidence, whether or not Pan withdrew her EB-5 application after purportedly receiving her I-526 approval from USCIS had no impact on the outcome of the merits of GOCH's appeal.[11] Accordingly, the court should disregard GOCH's argument in its entirety.

(ii) GOCH's Argument That Pan Has Not Abided By A Valid And Enforceable Operating Agreement Should Be Disregarded Because They Are Conclusory And Not Supported By Any Evidence.

GOCH argues that the court "must invoke judicial restraint when a party restraint when a party litigant has not: (1) Complied with federal

[11] See Division 1's October 15, 2018 ruling at p. 14, attached hereto as "Exhibit A."

law; nor (2) Abided by a valid and enforceable Operating Agreement; or (3) A signed and acknowledged PPM that expressly prohibits her from obtaining monies that she represented would be going towards creating jobs and promoting the U.S. economy."[12]

As discussed above, this is not an immigration case. Accordingly, this argument should be disregarded in its entirety.

Second, even assuming the Agreement was valid and enforceable, when fraud or misrepresentation is involved on the part of one party (e.g. GOCH, Chen and Wang), then, the non-breaching party (Pan) is excused from performing. One of Pan's remedies under WSSA is rescission. RCW 21.20.430(4)(b) provides:

> "No person may sue under this section if the buyer or seller *receives* a written rescission offer, which has been passed upon by the director before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at eight percent per annum from the date of payment, less the amount of any income received on the security in the case of a buyer, or plus the amount of income received on the security in the case of a seller."

The unambiguous language of RCW 21.20.430(2) provides that a defrauded seller may sue for rescission to recover the security. Helenius v. Chelius, 131 Wn. App. 421, 432, 120 P.3d 954 (2005). The trial court concluded that the "purpose and intent of the remedies set forth in RCW

[12] See GOCH Petition at p. 17.

§21.20.430 is rescission of the investment," and Pan was entitled to a return of her initial investment of $519,500.[13]

When Pan filed a motion for partial summary judgment on her WSSA claim, she requested an Order holding that "(1) The statements in the Private Placement Memorandum ("PPM") were materially misleading; (2) That Plaintiffs' reliance on the statements made in the PPM was reasonable."[14]

The trial court properly addressed these two issues. On June 3, 2016, the trial court granted Pan's motion for partial summary judgment as to the first issue and determined GOCH's statements in the PPM that it "had secured an eighty (80) year lease with the Port of Longview were material, false, and misleading.[15] On September 27, 2016, the court granted the motion as to the second issue and determined Pan reasonably relied on materially false and misleading statements set forth in the PPM.[16]

Pan was able to prove to the trial court that GOCH misrepresented a material fact. A "material fact" is one "to which a reasonable person would attach importance in determining his or her choice of action in the transaction in question. Guarino v. Interactive Objects, Inc., 122 Wn. App.

[13] CP 1338.
[14] CP 414-15.
[15] CP at 2062.
[16] CP at 1162.

95, 114, 86 P.3d 1175 (2004)(alterations in original)(quoting Aspelund v. Olerich, 56 Wn. App. 477, 481-82, 784 P.2d 179 (1990)). A "misrepresentation" is a false statement regarding an existing fact. Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 182, 876 P.2d 435 (1994).

In this matter, GOCH's PPM provides information about its investor-funded projects. The PPM specifically stated:

> "The Project currently consists of approximately 65 acres of land for long term 80 years lease (40 years plus 40 years right's extension) from Port of Longview with 5000,000 Sq. Ft. warehouse for further project re-development, that is entitled and ready for the construction of 500,000 Sq. Ft packinghouse and CA (Cold Atmospheres) cold-storage warehouse at Port of Longview, Washington."[17]

The PPM also describes the packinghouse as "shovel ready."[18]

However, GOCH, in response to Pan's interrogatories, admitted that "Great Ocean and Huy Ying Chen did not enter into contractually binding lease agreement with the Port of Longview."[19] Despite this explicit response, GOCH argues the statements in the PPM were not false because they had in fact entered into a "pre-contract" with the Port of Longview. This argument is simply conclusory and a statement of semantics, and fails to cite to any meaningful authority or argument.

---

[17] CP at 57.
[18] CP at 52.
[19] CP at 435.

Regarding materiality, Pan submitted a declaration stating, "If my father and I knew the statement from PPM and Chen were not true, we would not invest money into the project."[20] GOCH has not and cannot establish the existence of a genuine issue of material fact as to whether the statements in the PPM were materially misleading.

Regarding whether Pan reasonably relied on the statements, under the WSSA, the investor must show the reliance was reasonable "under the surrounding circumstances." Federal Home Loan Bank v. Barclays Capital, Inc., 1 Wn. App. 2d 551, 565, 406 P.3d 686 (2017)(quoting FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 175 Wn. App. 840, 868, 309 P.2d 555 (2013), aff'd, 180 Wn.2d 954 (2014)), review granted, 190 Wn.2d 1018 (2018). Generally, whether reliance is reasonable is a factual inquiry. *Id.* But "if reasonable minds could reach only one conclusion, summary judgment on this element is proper." Id.

Courts apply eight factors from Stewart v. Estate of Steiner to determine reasonableness. No individual factor is necessarily dispositive. Barclays, 1 Wn. App. 2d at 568 (citing Stewart, 122 Wn. App. 274, 93 P.3d 919 (2004)). The factors are:

> "(1) The sophistication and expertise of the plaintiff in financial and securities matters, (2) the existence of longstanding business or personal relationships, (3) access to the relevant information, (4)

[20] CP at 2078.

> the existence of a fiduciary relationship, (5) concealment of the fraud, (6) the opportunity to detect the fraud, (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction, and (8) the generality or specificity of the misrepresentations." Stewart, 122 Wn. App. 258, 93 P.3d 919 (2004).

At the trial court, Pan submitted a declaration that she "viewed Captain Chen as my uncle."[21] She also stated, "Captain Chen was a family friend and at that time I did not have any reason to believe what he told us was not the truth." Id. Pan acknowledged that she did some translating work for Great Ocean, but she stated she "did not create the content of the documents."[22] Pan also stated, "Ultimately, while I may have had access to some of Great Ocean's records, I did not have complete access to all of its records."[23]

Before the Supreme Court, GOCH did not address the Stewart factors and did not specifically contend that Pan failed to establish reasonable reliance. Rather, GOCH argues that Pan is barred from recovery for the following reasons:

> (1) This case is preempted by federal law because the United States Citizenship and Immigration Service ("USCIS") granting Respondents Pan and Zhang a conditional green card deprived the state trial court of subject matter jurisdiction.

[21] CP at 2079.
[22] CP at 2081.
[23] CP at 2082

These arguments are conclusory, speculative, and not supported by law or facts. GOCH fails to provide any Stewart analysis to determine whether Pan's reliance was reasonable. Indeed, GOCH did not even discuss it in the Petition for Review.[24] Furthermore, GOCH fails to provide to provide any evidence from the record to establish Pan and Zhang received a conditional green card approval. Furthermore, as discussed above, this is not an immigration case. This is a Washington State Securities Act claim, subject to Washington state law. Accordingly, GOCH's Petition for Discretionary Review must be denied.

IV. CONCLUSION.

Subject matter jurisdiction exists over this matter, a Washington State Securities Act case. Discretionary review is not proper because GOCH has failed to show that the Court of Appeal's order dated October 15, 2018 was erroneous. Furthermore GOCH has failed to show that the Court of Appeal's denial of reconsideration was erroneous. Accordingly, this court should deny GOCH's Petition for Discretionary Review in its entirety.

[24] See GOCH's Petition at p. 1-19.

Respectfully submitted this 7th day of February, 2019.

MDK Law

/s/ ***Courtney D. Bhatt***

_____

JAMES P. WARE, WSBA# 36799
COURTNEY D. BHATT, WSBA# 46298
MDK Law
777 108th Ave NE, Suite 2000
Bellevue, WA 98004
Telephone: (425) 455-9610
Fax: (425) 455-1170
jware@mdklaw.com
cbhatt@mdklaw.com
Attorneys for Respondents

DECLARATION OF SERVICE

I certify that on February 7, 2019, I caused a true and correct copy of the foregoing to be served on the following in the manner indicated below:

Petitioners Huy Ying Chen and Xue Ping Wang
5112 189th Avenue N.E.
Sammamish, WA 98074
Email: hy@nobo.us

Via US Mail and Petitioners' email address.

Attorney for Great Ocean Capital Holdings, LLC
Tuella O. Sykes, Attorney at Law
Law Office of Tuella O. Sykes, PLLC
600 Steward Street, Suite 1300
Seattle, WA 98101
(206) 721-0086
tos@tuellasykeslaw.com

Via US Mail and Appellants' email address.

Dated: February 7, 2019

/s/ Courtney D. Bhatt
Courtney D. Bhatt
MDK Law
(425) 455-9610

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

October 15, 2018

Courtney Diane Bhatt
MDK Law
777 108th Ave NE Ste 2000
Bellevue, WA 98004-5146
cbhatt@mdklaw.com

James P Ware
MDK Law Associates
777 108th Ave NE Ste 2000
Bellevue, WA 98004-5146
jware@mdklaw.com

Huy Ying Chen
5112 189th Avenue NE
Sammamish, WA 98074

Huy Ying Chen
7554 185th Ave N.E.
Suite 200
Redmond, WA 98052
hy@nobo.us

Xue Ping Wang
5112 189th Avenue NE
Sammamish, WA 98074

Tuella O Sykes
Law Offices of Tuella O Sykes PLLC
600 Stewart St Ste 1300
Seattle, WA 98101-1255
tos@tuellasykeslaw.com

Xue Ping Wang
7554 185th Avenue N.E.
Suite 200
Redmond, WA 98052
hy@nobo.us

CASE #: 76576-1-I
Yanlu Liu, et al, Respondents v. Great Ocean Capital Holding, LLC, et al, Appellants
King County, Cause No. 15-2-28694-3 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Therefore, we affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Suzanne Parisien

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

YANLU LIU and AI HUA PAN, husband and wife, residing in King County, Washington; PENG ZHANG and ZHONGYUAN PAN, husband and wife, residing in Ontario, Canada, Respondents, v. GREAT OCEAN CAPITAL HOLDING, LLC, a Washington limited liability company; HUY YING CHEN and XUE PING WANG, husband and wife, residing in Washington state; Appellants.	No. 76576-1-I UNPUBLISHED OPINION FILED: October 15, 2018

VERELLEN, J. — Great Ocean Capital Holding, LLC challenges the trial court's jurisdiction and authority to enter judgment on Zhongyuan Pan's claim under the Washington State Securities Act, chapter 21.20 RCW (WSSA). Great Ocean fails to establish the trial court lacked subject matter jurisdiction or either field or conflict preemption applies.

Great Ocean also argues the trial court erred in granting summary judgment in Pan's favor but fails to establish the existence of a genuine issue of material fact. Great Ocean's other challenges to the trial court's orders striking Great

Ocean's answer and determining Pan was entitled to rescission of her investment are similarly without merit.

Therefore, we affirm.

FACTS

Great Ocean is a United States Citizen and Immigration Service designated regional center for purposes of the EB-5 Immigrant Investor Program. Appellants Huy Ying Chen and Xue Ping Wang, husband and wife, own a majority interest in Great Ocean. Respondents Yanlu Liu and Ai Hua Pan, husband and wife, own a minority interest. Yanlu Liu and Ai Hua Pan are the parents of Zhongyuan Pan.

Pan invested $519,500 in Great Ocean for the purpose of obtaining a visa through the EB-5 Program. The EB-5 Program allows foreign investors and their families to obtain residency in the United States.

In November 2015, Pan and her parents filed a lawsuit against Great Ocean for breach of contract, fraudulent and negligent misrepresentation, violation of the WSSA, violation of the Consumer Protection Act, chapter 19.86 RCW, breach of fiduciary duty, and accounting.[1]

The trial court entered orders granting partial summary judgment on Pan's WSSA claim, striking Great Ocean's answer and affirmative defenses, and entering findings of fact, conclusions of law, and judgment on Pan's WSSA claim. The principal amount of judgment was $519,500 for Pan's initial investment.

---

[1] Respondents' claims for breach of contract, fraud, and violation of the Consumer Protection Act were submitted for arbitration. Following partial summary judgment on Pan's WSSA claim, respondents voluntarily dismissed all other claims.

Great Ocean appeals.

ANALYSIS

I. Jurisdiction

Great Ocean contends the trial court lacked subject matter jurisdiction to render judgment in this case.

We review whether a court has subject matter jurisdiction de novo.[2] "'A judgment entered by a court that lacks subject matter jurisdiction is void.'"[3]

"As courts of general jurisdiction, superior courts have long had the 'power to hear and determine all matters, legal and equitable, . . . except in so far as these powers have been expressly denied.'"[4] In light of this broad grant of subject matter jurisdiction, "courts may only find a lack of jurisdiction under compelling circumstances, such as when it is explicitly limited by the Legislature or Congress."[5]

Here, the trial court decided Pan's WSSA claim. Washington State superior courts have subject matter jurisdiction to decide WSSA claims. And Great Ocean fails to offer any compelling authority that the trial court lacked subject matter jurisdiction to render judgment on Pan's WSSA claim. Oddly, Great Ocean cites to

---

[2] Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310, 314, 76 P.3d 1183 (2003).

[3] Cole v. Harveyland, LLC, 163 Wn. App. 199, 205, 258 P.3d 70 (2011) (quoting Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 541, 886 P.2d 189 (1994)).

[4] In re Marriage of Major, 71 Wn. App. 531, 533, 859 P.2d 1262 (1993) (alteration in original) (quoting State ex rel. Martin v. Superior Court, 101 Wash. 81, 94, 172 P. 257 (1918)).

[5] Id. at 534.

a federal regulation addressing preemption of state laws in the area of chemical facility anti-terrorism standards.[6] Great Ocean makes the conclusory argument that a state trial court does not have jurisdiction over matters touching on immigration. But this is not an immigration case, and Great Ocean cannot establish lack of subject matter jurisdiction simply because of Great Ocean's status as a United States Citizen and Immigration Service designated regional center or the nature of the EB-5 program.

The trial court did not lack jurisdiction to render judgment against Great Ocean on Pan's WSSA claim.

II. Preemption

Great Ocean argues the trial court's authority to enter judgment on Pan's WSSA claim is preempted by federal law.

A state law can be preempted in two ways: (1) field preemption (express or implied) or (2) conflict preemption.[7] "If Congress indicates an intent to occupy a given field (explicitly or impliedly), any state law falling within that field is preempted; even if Congress has not indicated an intent to occupy a field, state law is still preempted to the extent it would actually conflict with federal law."[8] "Such a conflict occurs (1) when compliance with both laws is physically

---

[6] See Br. of Appellant at 22-23 (citing 6 C.F.R. § 27.405).

[7] Inlandboatmen's Union of the Pac. v. Dep't of Transp., 119 Wn.2d 697, 701, 836 P.2d 823 (1992).

[8] Id.

impossible, or (2) when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[9]

Here, Great Ocean fails to establish field preemption. The federal statutes cited by Great Ocean do not expressly or impliedly address a Washington State superior court's authority to hear a WSSA claim.[10]

As to conflict preemption, Great Ocean argues the return of Pan's investment stands as an obstacle to the purpose of the EB-5 program to foster foreign investment and job creation. But Great Ocean fails to cite any compelling authority to support this argument.

Additionally, under 15 U.S.C. § 77r(c)(1)(A)(i), states retain the authority "under the laws of such [s]tate to investigate and bring enforcement actions, in connection with securities or securities transactions . . . with respect to—fraud or deceit."

We conclude Pan's WSSA claim is not preempted by federal law.

III. Partial Summary Judgment—WSSA Claim

Great Ocean contends the trial court erred in granting partial summary judgment on Pan's WSSA claim.

We review an order granting summary judgment de novo.[11] "The moving party has the burden of showing that there is no genuine issue as to any material

---

[9] Id. at 702.

[10] See Br. of Appellant at 27 (citing 15 U.S.C. § 771(a)(1) (Federal Energy Administration Comptroller General, powers and duties)).

[11] CR 56(c); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

fact."[12] A response to a summary judgment motion "'must set forth specific facts showing that there is a genuine issue for trial.'"[13]

"To establish liability under the WSSA, the purchaser of a security must prove that the seller and/or others made material misrepresentations or omissions about the security, and the purchaser relied on those misrepresentations or omissions."[14]

On May 6, 2016, Pan filed a motion for partial summary judgment on her WSSA claim. Specifically, Pan requested "an Order holding that: (1) The statements in the Private Placement Memorandum ("PPM") were materially misleading; (2) That Plaintiffs' reliance on the statements made in the PPM was reasonable."[15]

The court addressed the two issues separately. On June 3, 2016, the trial court granted Pan's motion for partial summary judgment as to the first issue and determined Great Ocean's statements in the PPM that it "had secured an [e]ighty (80) year lease with the Port of Longview were material, false, and misleading."[16] On September 27, 2016, the court granted the motion as to the second issue and

---

[12] Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

[13] State v. Mandatory Poster Agency, Inc., 199 Wn. App. 506, 517, 398 P.3d 1271 (quoting CR 56(e)), review denied, 189 Wn.2d 1021 (2017).

[14] Stewart v. Estate of Steiner, 122 Wn. App. 258, 264, 93 P.3d 919 (2004) (citing RCW 21.20.010(2)).

[15] Clerk's Papers (CP) at 414-15.

[16] CP at 2062.

determined "Pan [r]easonably relied on materially false and misleading statements set forth in the PPM."[17]

"A 'material fact' is one 'to which a reasonable [person] would attach importance in determining his [or her] choice of action in the transaction in question.'"[18] A "misrepresentation" is a false statement regarding an existing fact.[19]

Here, the PPM provides information about Great Ocean's investor-funded projects. At issue are the statements contained in the PPM concerning a lease with the Port of Longview and Great Ocean's plans to build a cold storage facility:

> The Project currently consists of approximately 65 acres of land for long term 80 years lease (40 years plus 40 years right's extension) from Port of Longview with 500,000 Sq. Ft. warehouse for further project re-development, that is entitled and ready for the construction of 500,000 Sq. Ft packinghouse and CA (Cold Atmospheres) cold-storage warehouse at Port of Longview, Washington.[20]

The PPM also describes the packinghouse as "shovel ready."[21] But in response to interrogatories, Great Ocean admitted that "Great Ocean and Huy Ying Chen did not enter into a contractually binding lease agreement with the Port of Longview."[22] Despite this response, Great Ocean argues the statements in the PPM were not

---

[17] CP at 1162.

[18] Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 114, 86 P.3d 1175 (2004) (alterations in original) (quoting Aspelund v. Olerich, 56 Wn. App. 477, 481-82, 784 P.2d 179 (1990)).

[19] Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 182, 876 P.2d 435 (1994) (negligent misrepresentation claim).

[20] CP at 57.

[21] CP at 52.

[22] CP at 435.

false because they had in fact entered into a "pre-contract" with the Port of Longview.

Great Ocean's briefing rests on semantics rather than meaningful authority or argument. Great Ocean cites minutes from a February 26, 2013 meeting between Great Ocean and representatives from the Port of Longview and argues the meeting minutes constitute a "pre-contract."[23] The meeting minutes memorialize that "[Port of Longview] agree lease maximum years for 80 years."[24] But the minutes also state "[Port of Longview] will provide a fair lease price," clear evidence that Great Ocean had not yet secured an enforceable lease. At the February 26, 2013 meeting, the lease was discussed, not finalized.

As to materiality, Pan submitted a declaration stating, "If my father and I knew the statement from PPM and Chen were not true, we would not invest money into the project."[25]

Great Ocean fails to establish the existence of a genuine issue of material fact as to whether the statements in the PPM were materially misleading.

As to the second issue, whether Pan reasonably relied on the statements, under the WSSA, the investor must also show the reliance was reasonable "'under the surrounding circumstances.'"[26] In general, whether reliance is reasonable is a

---

[23] CP at 1208.

[24] CP at 1212.

[25] CP at 2078.

[26] Federal Home Loan Bank v. Barclays Capital, Inc., 1 Wn. App. 2d 551, 565, 406 P.3d 686 (2017) (quoting FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 175 Wn. App. 840, 868, 309 P.3d 555 (2013), aff'd, 180 Wn.2d 954 (2014)), review granted, 190 Wn.2d 1018 (2018).

factual inquiry.[27] But "if reasonable minds could reach only one conclusion, summary judgment on this element is proper."[28]

To determine whether reliance is reasonable, we apply the factors from Stewart v. Estate of Steiner.[29] No individual factor is necessarily dispositive.[30] "The factors are:

> '(1) the sophistication and expertise of the plaintiff in financial and securities matters, (2) the existence of longstanding business or personal relationships; (3) access to the relevant information, (4) the existence of a fiduciary relationship, (5) concealment of the fraud, (6) the opportunity to detect the fraud, (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction, and (8) the generality or specificity of the misrepresentations.'"[31]

In opposition to Great Ocean's motion for summary judgment, Pan submitted a declaration that she "viewed Captain Chen as my uncle."[32] She also stated, "Captain Chen was a family friend and at that time I did not have any reason to believe what he told us was not the truth."[33] Pan acknowledged that she did some translating work for Great Ocean, but she stated she "did not create the content of the documents."[34] "Ultimately, while I may have had access to some of Great Ocean's records, I did not have complete access to all of its records."[35]

---

[27] Id.

[28] Id.

[29] 122 Wn. App. 258, 93 P.3d 919 (2004).

[30] Barclays, 1 Wn. App. 2d at 568 (citing Stewart, 122 Wn. App. at 274).

[31] Id. (quoting Stewart, 122 Wn. App. at 274).

[32] CP at 2079.

[33] Id.

[34] CP at 2081.

[35] CP at 2082.

On appeal, Great Ocean does not address the Stewart factors and does not specifically contend Pan failed to establish reasonable reliance. Rather, Great Ocean attempts to address reasonable reliance by arguing that Pan is barred from recovery under WSSA due to her various misrepresentations. But the individual arguments concerning Pan's alleged misrepresentations are conclusory and speculative.[36]

First, Great Ocean argues Pan misrepresented her date of entry into the United States. Great Ocean speculates Pan had actual knowledge of the preliminary nature of the lease agreement because she happened to be in the United States at the time of the February 2013 meeting between Great Ocean and the Port of Longview. Great Ocean accurately cites Guarino v. Interactive Objects, Inc. for the proposition that actual knowledge would defeat a WSSA claim[37] but fails to present specific evidence to support the contention that Pan was present at the meeting.

Second, Great Ocean argues Pan misrepresented herself as a "sophisticated" and "accredited" investor in the subscription agreement she signed. In her declaration, Pan stated, "I did not have any reason to believe what [Chen] told us was not the truth" and "I assumed that Great Ocean had a lease."[38] Great Ocean contends these statements reveal Pan was not a sophisticated or

---

[36] See Boguch v. Landover Corp., 153 Wn. App. 595, 610, 224 P.3d 795 (2009)) ("a party resisting summary judgment cannot satisfy his or her burden of production merely by relying on conclusory allegations, speculative statements, or argumentative assertions").

[37] 122 Wn. App. 95, 113, 86 P.3d 1175 (2004).

[38] CP at 2079.

accredited investor because she "blindly invested $500,000.00 without conducting any due diligence."[39] But Great Ocean provides insufficient citation to the record to establish a misrepresentation and insufficient citation to authority to establish that Pan's alleged misrepresentation bars recovery. This conclusory argument is not persuasive.

Great Ocean fails to establish the existence of a genuine issue of material fact whether Pan's reliance on the statements in the PPM was reasonable. As a result, we conclude the trial court did not err in granting Pan's motion for partial summary judgment on the WSSA claim.

IV. Striking Answer

Great Ocean argues the trial court erred in striking its answer and affirmative defenses based on the failure to supplement its answers to discovery.

We review a motion to strike made in conjunction with a motion for summary judgment de novo.[40]

Before imposing a harsh discovery sanction, a trial court is required to consider the factors from Burnet v. Spokane Ambulance:

> A trial court may impose only the most severe discovery sanctions upon a showing that (1) the discovery violation was willful or deliberate, (2) the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the court explicitly considered less severe sanctions.[41]

---

[39] Br. of Appellant at 37.

[40] Southwick v. Seattle Police Officer John Doe, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008).

[41] Teter v. Deck, 174 Wn.2d 207, 216-17, 274 P.3d 336 (2012) (citing Burnet v. Spokane Ambulance, 131 Wn.2d 484, 496-97, 933 P.2d 1036 (1997)).

"Findings regarding the Burnet factors must be made on the record."[42]

Here, the court sufficiently addressed the Burnet factors in its order striking defendants' answer and affirmative defenses entered on November 28, 2016.[43]

We conclude the trial court did not err in granting the motion to strike.

V. Judgment

Great Ocean challenges the trial court's award of damages, arguing that Pan's failure to make a demand under RCW 21.20.430 precludes any award of damages.

Under RCW 21.20.430(2):

> Any person who buys a security in violation of the provisions of RCW 21.20.010 is liable to the person selling the security to him or her, who may sue either at law or in equity to recover the security, together with any income received on the security, upon tender of the consideration received, costs, and reasonable attorneys' fees, or if the security cannot be recovered, for damages. Damages are the value of the security when the buyer disposed of it, and any income received on the security, less the consideration received for the security, plus interest at eight percent per annum from the date of disposition, costs, and reasonable attorneys' fees.

"The unambiguous language of RCW 21.20.430(2) provides that a defrauded seller may sue for rescission to recover the security."[44]

---

[42] Id. at 217.

[43] The court determined the violation was willful, the refusal to provide discovery frustrated the ability to prosecute plaintiffs' claims, the court's use of monetary sanctions was ineffective, and striking portions of the answer was the least harsh effective remedy available.

[44] Helenius v. Chelius, 131 Wn. App. 421, 432, 120 P.3d 954 (2005).

Here, the trial court concluded, "The purpose and intent of the remedies set forth in RCW § 21.20.430 is rescission of the investment," and Pan was entitled to a return of her initial investment of $519,500.[45]

Great Ocean contends the trial court erred in determining Pan was entitled to rescission of her investment because she failed to demand a return of her investment prior to initiating her lawsuit.[46]

RCW 21.20.430(4)(b) provides:

> No person may sue under this section if the buyer or seller *receives* a written rescission offer, which has been passed upon by the director before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at eight percent per annum from the date of payment, less the amount of any income received on the security in the case of a buyer, or plus the amount of income received on the security in the case of a seller.[47]

Great Ocean fails to point to any evidence it issued a written rescission offer to Pan. Rather, Great Ocean argues Pan was not entitled to judgment because she never demanded return of her capital contribution. Great Ocean does not cite any authority to support the argument that Pan must make a demand before filing a lawsuit under the WSSA.

We conclude the trial court did not err in determining Pan was entitled to rescission and awarding a principal judgment amount of $519,500.

---

[45] CP at 1338.

[46] Although Great Ocean frames the issue in terms of the adequacy of the court's findings of fact, it is not a true sufficiency challenge but rather a restatement of Great Ocean's theory that Pan is not entitled to rescission.

[47] (Emphasis added.)

VI. Motion to Strike

In Great Ocean's reply brief, Great Ocean renews its motion to strike respondents' brief.

On March 15, 2018, Great Ocean moved to strike respondents' brief and to remand to the trial court for RAP 9.11 proceedings. On April 5, 2018, Commissioner Neel denied the motion and directed Great Ocean to include such a motion in its briefing to the panel.

In the original motion, Great Ocean argued respondents improperly supplemented the record on appeal without complying with RAP 9.11. Great Ocean claimed the respondents improperly supplemented the record with evidence that Pan withdrew her EB-5 application and evidence that she demanded return of her investment prior to filing the lawsuit.

Because respondents have not complied with RAP 9.11, we decline to consider this evidence because it is not part of the record on appeal.[48] The absence of this evidence has no impact on the outcome of the merits of Great Ocean's appeal.

---

[48] Harbison v. Garden Valley Outfitters, Inc., 69 Wn. App. 590, 593-94, 849 P.2d 669 (1993) ("RAP 9.11 is a limited remedy under which this court may direct that additional evidence may be taken if all of the following six criteria are met: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.") (quoting RAP 9.11(a)).

VII. Fees on Appeal

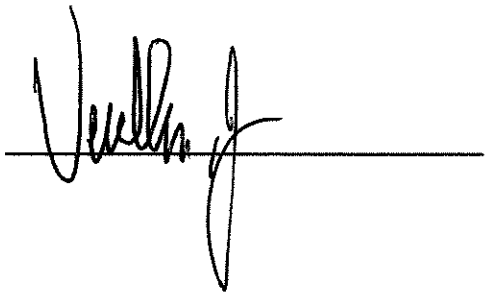
Pan seeks fees on appeal under the subscription agreement and RAP 18.1.

"RAP 18.1(b) requires more than a bald request for attorney fees on appeal."[49] The request must be accompanied by citation to authority, argument, and citation to the record.[50]

Here, Pan claims the subscription agreement contains a fee clause but provides no citation to the record identifying such a provision.[51]

We deny Pan's request for fees on appeal.

Therefore, we affirm.



WE CONCUR:

[49] Thweatt v. Hommel, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992).

[50] Gardner v. First Heritage Bank, 175 Wn. App. 650, 677, 303 P.3d 1065 (2013).

[51] See In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (courts are not obligated "to comb the record" where counsel has failed to support arguments with citations to the record).

MDK LAW

February 07, 2019 - 10:19 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96655-9
Appellate Court Case Title:	Yanlu Liu, et al. v. Great Ocean Capital Holding, LLC, et al.
Superior Court Case Number:	15-2-28694-3

The following documents have been uploaded:

- 966559_Answer_Reply_20190207101856SC184384_0824.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Response to GOCH Petition with TOC TOA and Appendix.pdf

A copy of the uploaded files will be sent to:

- hy@nobo.us
- jware@mdklaw.com
- tos@tuellasykeslaw.com

Comments:

Answer to Great Ocean Capital Holding, LLC's Petition for Review

---

Sender Name: Courtney Bhatt - Email: cbhatt@mdklaw.com
Address:
777 108TH AVE NE STE 2000
BELLEVUE, WA, 98004-5146
Phone: 425-455-9610

Note: The Filing Id is 20190207101856SC184384